IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALFRED SHORT — PLAINTIFF

VS. — CAUSE NO. 1:95CV359-D-D

CITY OF WEST POINT, MS and
RICHARD STRIPLING, Individually
and in his Official Capacity as
Fire Chief of the City of West Point — DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court upon the motion of the defendants for summary judgment as to the plaintiff's First Amendment retaliation claims. The defendants filed with the court a motion for summary judgment on October 15, 1996 and requested that a judgment as a matter of law be granted in their favor as to the plaintiff's First Amendment claims, in addition to the plaintiff's remaining claims. However, the defendants did not raise in their motion or supporting brief the argument that the plaintiff's speech was not constitutionally protected because it did not involve a matter of public concern. Indeed, this premise for dismissal was not outlined until the defendants filed their rebuttal brief. The court granted the defendants' motion in part, but allowed the plaintiff additional time in which to respond to the defendants' public concern argument. Short v. City of West Point, et al., Cause No. 1:95CV359-D-D (N.D. Miss. Dec. 17, 1996) (Davidson, J.) (Memorandum Opinion and Order Granting in Part Motion for Summary Judgment). The plaintiff has so responded and

the defendants have filed their rebuttal brief as to this issue. The matter is now ripe for determination.

LEGAL DISCUSSION[1]

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Vera v. Tue, 73 F.3d 604, 607 (5th Cir. 1996). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-

[1]This court has previously set forth the full factual underpinnings of this cause of action and declines to do so again. Short v. City of West Point, et al., Cause No. 1:95CV359-D-D, pp. 2-3 (N.D. Miss. Dec. 17, 1996) (Davidson, J.) (Memorandum Opinion). Only facts relevant to the issue to be decided will be related as necessary.

moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Banc One Capital Partners Corp. v. Kniepper, 67 F.3d 1187, 1198 (5th Cir. 1995); Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

II. FIRST AMENDMENT PROTECTION

In its simplest terms, the issue before the court is whether the defendants violated the First Amendment when they allegedly retaliated against the plaintiff for his filing of an EEOC charge based upon race discrimination. The claim brought before the EEOC reads:

> On or about October 15, 1994, I learned that I had not been selected for the promotional position of Pump Operator.
>
> Chief Richard Stripling has not given me a reason as to why I was not selected.
>
> I believe that I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended because:
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> A White fire fighter was promoted who was not better qualified for the position than I am. He failed the promotional test for the position, I passed with the highest score.[2]

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[2]In his brief to the court on the retaliation claim, the plaintiff states that the full text of the EEOC charge reads:

> I have been employed as a fire fighter EMT for two years and ten months. On or about August 30, 1994, I, along with seven others, took the test for promotion to pump operator. I was the only Black. According to the

EEOC Charge, Exh. F att. Plaintiff's Response to Defendants' Motion for Summary Judgment. The plaintiff submits two premises in support of his opposition to the defendants' motion. First, Short contends that his EEOC charge alleging racial discrimination by a public body involves a matter of public concern and that retaliation related to the charge thus violates the "free speech" portion of the First Amendment. Second, the plaintiff urges that he is protected from retaliation related to the making of the EEOC charge by the "petition for redress of grievances" portion of the First Amendment without regard to whether the EEOC charge implicates a matter of public concern.

A. Free Speech

> scoring, I was one of the two to pass the test. About two weeks after the test, we were interviewed by Chief Richard Stripling, and City Councilman Jessie Harmon.
>
> On or about October 15, 1994, I learned that the position had been filled. Ton [sic] Lawson (W) was promoted. Tony took the test with me and he was not one of the ones who passed. There were about five promotions made around that same time, all were White. I believe that I have been discrimination [sic] against because of my race, Black. I am better qualified for the position than Tony, I passed the test, he did not.

Plaintiff's Brief on Whether Retaliation for Filing an EEOC Charge of Racial Discrimination Violates the First Amendment ("Plaintiff's Brief on Retaliation") at 1-2. The plaintiff provided the court with no citation subsequent to this quote referencing from whence it was taken. The text of the EEOC charge attached as Exhibit F to Plaintiff's Response to Defendants' Motion for Summary Judgment is quoted above in the body of the opinion. Although differences exist between the two quotes, these discrepancies have no impact on this court's application of the public concern test to the context of the EEOC charge. The court would reach the same decision interpreting either quote.

The plaintiff does not dispute that the free speech clause of the First Amendment only protects a public employee from retaliation relating to his speech if that speech involves a matter of public concern. Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1050 (5th Cir. 1996). As this issue is not in contention, the court shall first address whether the petition clause is also subject to the public concern prerequisite before the court concerns itself with whether or not the speech in question actually embraces a matter of public concern.

B. Petition for Redress of Grievances

The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I. The plaintiff contends that the final clause of the First Amendment affords him protection from retaliation for his filing a charge of racial discrimination with the EEOC. He further submits that this protection remains intact irrespective of whether or not his EEOC charge contains material of concern to the public. In support of his assertions, the plaintiff relies upon a Third Circuit case styled San Filippo v. Bongiovanni, 30 F.3d 424, 440-43 (3d Cir. 1994). After a thorough analysis of Supreme Court precedent and opinions by other circuit courts addressing the same

issue, the Third Circuit held the Connick public concern threshold[3] inapplicable to the petition clause of the First Amendment. San Filippo, 30 F.3d at 442. Instead the court endorsed a more lenient standard: First Amendment immunity is invoked if the petition is "non-sham," irrespective of whether the petition addresses a matter of public concern. Id. at 443 ("The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.").

The Third Circuit recognized, however, that

> each circuit court to consider the issue has held that a public employee who alleges that he or she was disciplined in retaliation for having filed a lawsuit against his or her employer does not state a claim under § 1983 unless the lawsuit addressed a matter of public concern.

Id. at 440 (citing cases). Two of the cases cited in support of that statement were Fifth Circuit cases. Id. at 440 n.19 (citing Day v. South Park Indep. Sch. Dist., 768 F.2d 696, 703 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S. Ct. 883, 88 L.Ed.2d 918 (1986); Rathjen v. Litchfield, 878 F.2d 836, 842 (5th Cir. 1989)).

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[3]Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). As discussed more thoroughly *infra*, the Connick Court held that the First Amendment only protects a governmental employee from retaliation based on expressive conduct constituting speech when the speech in question addresses a matter of "public concern." If the text of the speech may be interpreted to encompass a matter of concern to the public, then the court must balance the state's interest as an employer in promoting the efficiency of its workplace against the employee's interest as a citizen in commenting upon matters of public concern. Connick, 461 U.S. at 142, 103 S. Ct. at 1687.

In Day, an untenured high school teacher filed a § 1983 action against the school district. Day claimed that she was unconstitutionally discharged in violation of the First Amendment in retaliation for her protestations concerning the principal's unfavorable evaluation of her performance. Day, 768 F.2d at 697-99. When the appellate court affirmed the trial court's determination that Day's complaint to her supervisor concerned a purely private matter and thus fell outside the ambit of protected free speech, Day argued that the petition clause guarantees her a right separate and distinct from that set forth in the free speech clause. Id. at 701. The Fifth Circuit disagreed:

> [Day's argument] assumes that, when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping.[4]

Id. The court went on to note the absurdity of allowing First Amendment immunity when an employee has the foresight to clothe a personal complaint with a formal grievance, but disallowing such protection when the employee voices personal displeasure outside

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[4]See, e.g., McDonald v. Smith, 472 U.S. 479, 482-85, 105 S. Ct. 2787, 2789-91, 86 L.Ed.2d 384 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression. . . . The Petition Clause was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble. . . . These First Amendment rights are inseparable . . . .").

that protected forum.

> An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him.

Id. at 703. The Day Court, however, specifically noted that it left unaddressed "the situation that would be presented if a government employee sought assistance from a legislator or a member of the executive branch in a position to accord her relief who was not in the direct supervisory hierarchy." Id. The facts of the case *sub judice* are more closely analogous to the matter the Day Court left unaddressed. Short directed his grievance to the EEOC, a body certainly outside the control of Short's employer.

The Fifth Circuit came closer to addressing the matter in Brinkmeyer v. Thrall Indep. Sch. Dist., 786 F.2d 1291 (5th Cir. 1986). The facts of Brinkmeyer are similar to those of Day, except the teacher's aide in Brinkmeyer filed a lawsuit against the school district before she was actually fired. When the school district later terminated her employment, it listed her failure to make a good faith effort to resolve the matter before filing suit as one of the reasons justifying her discharge. Brinkmeyer, 786 F.2d at 1293-94. Brinkmeyer then filed a second lawsuit for wrongful discharge which the court consolidated with the first. Id. at 1294. The district court granted the defendants' motions for summary judgment holding that neither Brinkmeyer's conversations with her supervisor nor the filing of her first lawsuit met the

Connick prerequisite of pertaining to a matter of public concern. Id. The Fifth Circuit reversed and stated that under the summary judgment standard of viewing the evidence in the light most favorable to the nonmovant, the district court erred when it held at that procedural juncture that Brinkmeyer's speech did not touch upon a matter of public concern. Id. at 1295. Furthermore, the appellate court noted that

> the district court held that Brinkmeyer's right of access to the courts under the first amendment was barred by Connick. The district court's conclusion, however, appears based in part on its holding that the speech Brinkmeyer sought to protect in her initial action was not of public concern. On remand, the district court should reconsider its holding in light of this court's opinion.

Id. at 1295-96 (citing cases).[5] By not specifically addressing the matter, the Brinkmeyer Court implicitly agreed with the lower court's determination that the petition clause of the First Amendment is also subject to the Connick public concern prerequisite.

The Fifth Circuit ultimately put to rest in Rathjen v. Litchfield the issue of whether the public concern test applies to the petition clause. 878 F.2d 836 (5th Cir. 1989). Rathjen, an

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[5]The Fifth Circuit cited the following cases for comparison: Day, 768 F.2d at 702; Altman v. Hurst, 734 F.2d 1240, 1244 & n.10 (7th Cir.) ("[A] private office dispute cannot be constitutionalized merely by filing a legal action . . . ."), *cert. denied*, 469 U.S. 982, 105 S. Ct. 385, 83 L.Ed.2d 320 (1984); Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir.), *cert. denied*, 469 U.S. 823, 105 S. Ct. 98, 83 L.Ed.2d 44 (1984).

employee of the City of Houston, filed a lawsuit against the City after the City demoted her. Her working conditions continued to deteriorate after the filing. Rathjen, 878 F.2d at 837-38. Following a jury verdict in favor of Rathjen, the City appealed and argued that Rathjen's claim of retaliation for protesting her demotion and filing the lawsuit did not give rise to a federal cause of action. Id. at 841. The Fifth Circuit agreed. Id. The Rathjen Court noted that the Supreme Court

> established that the first amendment does not prevent a government employer from taking action in response to an employee's expression that does not touch upon a matter of public concern.

Id. (citing Connick, 461 U.S. at 146, 103 S. Ct. at 1690).

> . . . . *The law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit*.

Id. at 842 (emphasis added). The specific query facing the court was whether or not Rathjen's resistance to her demotion "*or her filing of [the] lawsuit*" embraced matters of public concern. Id. (emphasis added). The court found that Rathjen's actions were of no concern to the public as set forth in Connick and reversed the lower court's judgment.

Thus, the Fifth Circuit in Rathjen determined that an employee is only entitled to First Amendment protection from retaliation for the filing of a lawsuit if the subject of that suit is of concern to the public. Based on this binding precedent, the court is of the opinion that the petition clause of the First Amendment is

subject to the Connick public concern prerequisite.[6] The undersigned can discern no reason justifying the application of the Connick prerequisite to the filing of a lawsuit, but not to the filing of an EEOC complaint, as in the subject case. Indeed, the Fifth Circuit has stated that there is no difference between retaliation based on the filing of a lawsuit and retaliation grounded on the filing of a grievance. Rathjen, 878 F.2d at 842. As such, the text of Short's EEOC charge must embrace a matter of concern to the public in order to warrant protection under the First Amendment for retaliation based on the filing of that charge, regardless of whether that protection is sought under the free speech clause or the petition for redress of grievances clause.

III. MATTER OF PUBLIC CONCERN

The court has determined that the plaintiff is entitled to the shield of First Amendment protection for retaliation based upon his filing of an EEOC charge only if the charge contains a matter of concern to the public. This holding applies irrespective of whether the protection sought arises under the free speech clause

[6]The plaintiff states in his brief to the court that "the Fifth Circuit has implicitly held that filing a federal lawsuit is protected by the First [A]mendment without discussing whether the contents of the lawsuit contained any matter of public concern." Plaintiff's Brief on Retaliation at 5. In support of this statement, the plaintiff cites Enlow v. Tishomingo County, 962 F.2d 501 (5th Cir. 1992). After reading the Enlow decision, the undersigned disagrees with the plaintiff's interpretation of any implicit holding in that case with regard to the issue involved in this retaliation claim.

or the right to petition for redress of grievances clause. In determining whether speech involves a matter of public concern, courts must look to the content, form, and context of the speech. Wallace, 80 F.3d at 1050 (citing Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1990)).

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
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> * * *
>
> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 146, 147, 75 L.Ed.2d at 719, 720.

The plaintiff asserts that

> the motivating factor for the filing of the EEOC charge was Short's own concern about his not being promoted. On the other hand, the EEOC charge would be of interest to the public since it complains about a subject of great national debate, race discrimination, and because it indicates that the City is making employment decisions for reasons other than merit.

Short's Brief on Retaliation at 2. The plaintiff further asseverates that the Supreme Court has spoken to this issue and has held that complaints about racial discrimination are inherently matters of public concern. See Givhan v. Western Line Consolidated Sch. Dist., 439 U.S. 14, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979). The context of the speech in Givhan, which speech the Court held

protectable under the First Amendment, is clearly distinguishable from the context of the speech in the case *sub judice*. In Givhan, the plaintiff privately criticized her employer's practices and policies, which she perceived to be racially discriminatory. Givhan, 439 U.S. at 412-13, 58 L.Ed.2d at 622-23. Givhan spoke out, albeit in private, as a citizen on a matter of general public concern and the Supreme Court specifically noted that her speech was "not tied to a personal employment dispute." Connick, 461 U.S. at 148 n.8, 75 L.Ed.2d at 721 n.8.

In this case, Short has not spoken out as a citizen generally concerned about racial discrimination within the upper echelons of the City of West Point, but instead has spoken only as a employee distressed with how his employer's allegedly racially discriminatory practices have affected him alone. The Fifth Circuit addressed a similar scenario concerning alleged discrimination on the basis of national origin in Ayoub v. Texas A & M Univ., 927 F.2d 834 (5th Cir. 1991). In that case, Ayoub, an Egyptian-born professor employed by Texas A & M University ("University"), consistently complained about the University's pay system. Ayoub, 927 F.2d at 835-36. When his office was relocated to a less than desirable locale, Ayoub filed suit alleging retaliation based upon his objections to the University's allegedly discriminatory pay scale. Id. The Fifth Circuit held that Ayoub's speech did not involve a matter of public concern. Id. at 837.

Although the plaintiff protested the University's allegedly two-tier pay system (one pay scale for white, native-born professors and a second pay scale for foreign-born professors), he only did so in reference to how it applied to him. Id. The appellate court noted that

> Ayoub consistently spoke not as a citizen upon matters of public concern, but rather as an employee upon matters of only personal interest. Certainly, Ayoub never attempted to air his complaints in a manner that would call the public's attention to the alleged wrong.
>
> In sum, there is no evidence that Ayoub expressed concern about anything other than his own salary. *Although pay discrimination based on national origin can be a matter of public concern, in the context in which it was presented in this case by Ayoub, it was a purely personal and private matter*. As we found in *Terrell*,[7] Ayoub was not retaliated against, if he was at all, "for speaking 'as a citizen upon matters of public concern,' or for 'speak[ing] out as a citizen on a matter of general concern, *not tied to a personal employment dispute*.'"

Id. at 837-38 (quoting Terrell, 792 F.2d at 1363 (citations omitted) (last emphasis in original)).

The reasoning of Ayoub also precisely applies to the context in which Short's speech was made. Short's EEOC charge only decries the allegedly racially discriminatory practices of the City of West Point *as they specifically applied to Short*. Short alleges that he was not promoted to the position of Pump Operator, even though amply qualified, simply because he is a black man. As in Ayoub, while City promotions based on race can be a matter of public

[7]Terrell v. University of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1982).

concern, in the context in which Short presented his complaint, his speech only touched on a purely personal and private matter.

Furthermore, the court is unconvinced by the plaintiff's attempt to distinguish Ayoub on the basis of which suspect class is at issue. The plaintiff submits that

> [n]otwithstanding the public policy against discrimination based upon national origin, it is hardly arguable that discrimination in pay based on national origin raises the grave public debate as does [sic] issues of race discrimination. After all, race discrimination is a subject over which the nation has fought a great civil war, and upon which such matters as "affirmative action" . . . even now invoke rigorous debate.

Plaintiff's Brief on Retaliation at 3. Neither the Supreme Court nor the Fifth Circuit has ever made such a distinction and this court refuses to do so here. The test set out in Connick and consistently cited by courts is whether the plaintiff speaks as a *citizen* upon matters of public concern or as an *employee* upon matters only of personal interest. Based upon the reasoning in Ayoub, this court is constrained to hold that Short spoke only as an employee upon a matter of personal interest. As such, his retaliation claims must fail as a matter of law because his speech does not involve a matter of public concern.

CONCLUSION

It is undisputed that First Amendment protection for retaliation based on expressive conduct constituting speech only arises under the "free speech" clause when the speech in question

involves a matter of public concern. Based on Fifth Circuit precedent, this court holds that the public concern prerequisite also extends to any protection awarded under the "petition for redress of grievances" clause. Because Short's speech in question, his EEOC charge of racial discrimination, only touches upon a personal and private matter instead of embracing a matter of public concern, the court finds that Short has failed to state a federal retaliation claim under either the free speech clause of the petition clause of the First Amendment. The defendants are entitled to a judgment as a matter of law as to the plaintiff's retaliation claims.

A separate order in accordance with this opinion shall issue this day.

THIS the _____ day of January 1997.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALFRED SHORT — PLAINTIFF

VS. — CAUSE NO. 1:95CV359-D-D

CITY OF WEST POINT, MS and
RICHARD STRIPLING, Individually
and in his Official Capacity as
Fire Chief of the City of West Point — DEFENDANTS

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST THE PLAINTIFF'S FIRST AMENDMENT CLAIMS

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the defendants' motion for summary judgment against the plaintiff's First Amendment claims finds the motion well taken and shall grant it. Therefore, it is ORDERED that:

1) the defendants' motion for summary judgment as to the plaintiff's First Amendment retaliation claims is hereby GRANTED.

2) the plaintiff's claim for retaliation under the "free speech" clause of the First Amendment is hereby DISMISSED.

3) the plaintiff's claim for retaliation under the "petition for redress of grievances" clause of the First Amendment is hereby DISMISSED.

All memoranda, depositions, affidavits and other matters considered by the court in granting the defendants' motion for summary judgment are hereby incorporated and made a part of the

record in this cause.

SO ORDERED this _____ day of January 1997.

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United States District Judge